

**United States Department of Labor
Employees' Compensation Appeals Board**

M.B., Appellant

and

**U.S. POSTAL SERVICE, BUCHANAN
STATION, Chicago, IL, Employer**

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**Docket No. 17-0536
Issued: June 22, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 10, 2017 appellant, through counsel, filed a timely appeal from a November 8, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish a traumatic injury in the performance of duty on March 6, 2015.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 12, 2015 appellant, then a 55-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on March 6, 2015 she sustained contusions and abrasions to her left skull as the result of a fight with a coworker.

In a March 6, 2015 authorization for examination and treatment (Form CA-16), an employing establishment manager noted an injury date of March 6, 2015 and that appellant had been involved in a fight with a coworker. Medical treatment was approved for face injury/neck pain due to the March 6, 2015 incident.

Appellant submitted a March 7, 2015 report from Dr. Androni J. Henry, a physician specializing in emergency medicine, relating that appellant was seen in the emergency room on March 6, 2015. Dr. Henry requested appellant be excused from work for the period March 6 to 9, 2015.

In a March 9, 2015 duty status report (Form CA-20), Dr. Kanayo Odeluga, a physician Board-certified in internal medicine and occupational medicine, diagnosed facial injury due to a March 6, 2015 incident. He also provided work restrictions.

In March 13, 2015 work status summary, Dr. Odeluga diagnosed face, neck, and scalp contusion and cervicgia. He released appellant to return to work with restrictions effective March 9, 2015. Dr. Odeluga reported that the injury occurred when a coworker assaulted appellant and punched her in the face.

In an April 9, 2015 letter, the employing establishment controverted the claim based on findings from an investigation of the incident. It stated that appellant's behavior leading to the altercation was unbecoming of an employee, the conduct was willful, and not in the performance of duty. The employing establishment informed OWCP that she only filed the claim after being placed on emergency leave pending a thorough investigation of the incident. A March 12, 2015 statement from an employing establishment manager related that appellant and a coworker were involved in a physical altercation in the women's restroom. Neither the manager nor the postal inspectors observed any visible bruising on appellant.

On April 17, 2015 OWCP received supplemental notes dated March 9, 2015 from Dr. Odeluga diagnosing cervicgia and face, scalp, and neck contusion. Dr. Odeluga reported that appellant explained that a coworker had assaulted appellant, by punching her in the face, on March 6, 2015 and she was seen following her visit to the emergency room. Appellant complained of face and neck pain. Dr. Odeluga provided findings on examination and work restrictions.

By letter dated April 21, 2015, OWCP informed appellant that the evidence of record was insufficient to establish her claim. Appellant was advised as to the medical and factual evidence required and afforded 30 days to provide this information. No further evidence was received.

By decision dated May 22, 2015, OWCP denied appellant's claim as it found that she had not been in the performance of duty at the time of the March 5, 2015 incident. It noted that she had failed to provide details regarding the fight, including its origin.

In a letter dated August 8, 2015, appellant requested reconsideration of the denial of her claim. In an attached statement, she related that while on lunch break she was washing her hands in the ladies room on March 6, 2015 when a coworker physically assaulted her. Appellant stated that there was no personal association outside of work or any animosity between them. The coworker came in during the time appellant began to wash her hands and stood at the sink right next to her. While appellant was retrieving a paper towel to dry her hands she glanced back at the coworker who asked her “what the ‘f...’ you looking at.” The coworker got up close to appellant and hit her several times in the face. A clerk was also in the ladies room who came out of a stall and placed herself between them. Appellant related that the employing establishment had conducted an investigation of the incident, but had not provided her with a copy of the report. She contended that the incident was in the performance of duty and that she had filed a grievance.

By decision dated May 9, 2016, OWCP denied modification of the May 22, 2015 decision. It found that the evidence submitted by appellant failed to establish that she had been in the performance of duty at the time of the altercation with a coworker.

On June 17, 2016 OWCP received a March 7, 2015 report from Dr. Joel Benveniste, a Board-certified radiologist, who related that a computerized tomography scan of appellant’s facial bones revealed no evidence of fracture or destructive change.

On August 22, 2016 OWCP received counsel’s request for reconsideration. In support of the request for reconsideration, it received an April 11, 2015 grievance letter addressed to appellant’s union. In this statement, appellant reiterated the circumstances surrounding the assault and further noted that she did not throw any punches, but grabbed her assailant’s shirt in self-defense. She further explained that she informed the station manager that she wanted her assailant arrested. Appellant then called the police, but the station manager told her to leave the building. She stated that she left the building and did not return inside; when the police arrived they told her they could not do anything for her.

By decision dated November 8, 2016, OWCP denied modification.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.³ The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found requisite in workers’ compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, locale, and time of injury whereas, arising out of the employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.⁴

³ 5 U.S.C. § 8102(a). *See also P.S.*, Docket No. 08-2216 (issued September 25, 2009).

⁴ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-0217 (issued October 21, 2009).

To occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated to be engaged in his master's business; (2) at a place where she may reasonably be expected to be in connection with the employment; and (3) while she was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.⁵

This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury arising out of the employment must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury in order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.⁶

OWCP's procedure manual provides, "The employing [establishment] is required to complete the reports and statements needed and then submit the evidence to OWCP. In several types of claims (e.g., stress claims, claims with POD [performance of duty] issues such as premises, temporary duty travel, or recreational injuries), a statement from the employing [establishment] is imperative to properly develop and adjudicate the claim."⁷

ANALYSIS

Appellant filed a traumatic injury claim for injuries sustained on March 6, 2015 when she was involved in a fight or altercation in the ladies room and was punched in the face by a coworker. She went into the ladies room while on a lunch break. At the time of the assault, appellant was performing her duties during work hours. As discussed, however, time, place, and manner are not alone sufficient to establish entitlement to compensation. Appellant must also establish that her injury arose out of her employment or that a factor of her employment gave rise to the assault.⁸

The Board finds that the case is not in posture for decision regarding whether a factor of employment gave rise to the assault.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.⁹ The employing establishment, in an April 9, 2015 letter, controverted the claim based on

⁵ *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

⁶ *A. Larson*, *The Law of Workers' Compensation* § 8.00 (2006); *see also R.S.*, 58 ECAB 660 (2007).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011).

⁸ *See B.T.*, Docket No. 15-0786 (issued June 10, 2015).

⁹ *See L.L.*, Docket No. 12-0194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

findings from an investigation of the incident, but did not provide OWCP with a copy of any report or findings from the investigation. OWCP cited the lack of evidence from the employing establishment as a basis for the denial of appellant's claim.

On remand, OWCP should obtain a report investigating the March 6, 2015 incident from the employing establishment to clarify whether the altercation/fight was within or outside the performance of duty. After such further development as deemed necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 8, 2016 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 22, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board